

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH JENSEN,)
Petitioner,) Case No. C05-0807-TSZ
v.)
RICHARD MORGAN,) REPORT AND RECOMMENDATION
Respondent.)

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner has filed a 28 U.S.C. § 2241 petition for writ of *habeas corpus*. Respondent has filed a response opposing the petition. Following a careful review of the parties' pleadings and the record, the Court recommends that the petition be denied.

FACTS AND PROCEDURAL HISTORY

On April 17, 2002, petitioner was convicted by a jury in Snohomish County Superior Court on one count of second-degree murder with a deadly weapon (firearm). Dkt. No. 14, Ex. 2. Petitioner shot his neighbor following a long history of animosity. Dkt. No. 14, Ex. 6. Petitioner was sentenced to 195 months of confinement and is presently incarcerated at the Washington State Penitentiary in Walla Walla. Dkt. No. 14, Ex. 2; Dkt. No. 4.

01 A. Direct Review Proceedings

02 Petitioner appealed his conviction to the Washington Court of Appeals. Dkt. No. 14,
 03 Ex. 4. He argued that his conviction should be vacated under *In re: Andress*, 147 Wash. 2d
 04 602 (2002),¹ that the court had misstated the requirements of self defense in the jury
 05 instructions, and that the trial court erred by allowing the prosecutor to argue petitioner had a
 06 duty to warn his victim prior to shooting him. Dkt. No. 14, Ex. 4. On March 14, 2005, in an
 07 unpublished *per curiam* decision, the Washington Court of Appeals agreed with petitioner's
 08 first argument and reversed his conviction. Dkt. No. 14, Ex. 6. The court, however,
 09 remanded the case to the trial court to determine whether the State should be allowed to bring
 10 different charges in a manner consistent with the State's mandatory joinder rule.² *Id.* The
 11 court issued its mandate on June 10, 2005. Dkt. No. 18.

12 B. State Collateral Review

13 While petitioner's direct appeal was pending, he filed a filed variety of documents with
 14 the Snohomish County Superior Court designed to vacate his sentence. Dkt. No. 14, Ex. 9.
 15 On April 17, 2003, the court transferred those documents to the Court of Appeals, which
 16 construed them as a personal restraint petition ("PRP"). *Id.* On June 2, 2003, the Court of
 17 Appeals stayed consideration of the PRP pending the Washington Supreme Court's decision in
 18 *In re: Hinton*. 152 Wash. 2d 853 (2004) (en banc) (granting personal restraint petitions based
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20 ¹In *In re: Andress*, the Washington Supreme Court held that an assault cannot serve as
 21 the predicate felony for a second-degree felony-murder conviction. 147 Wash. 2d 602 (2002).

22 ²The Court of Appeals addressed petitioner's other two arguments as well, but only to
 23 provide guidance if the trial court allowed the State to bring new charges. It found that the
 24 trial court had erred when it attempted to clarify for the jury the definition of "ordinary
 25 battery," but did not determine whether the error was harmless because it vacated the
 26 conviction on *Andress* grounds. In addition, the court rejected petitioner's argument that the
 trial court erred by permitting the prosecutor to argue he had a duty to warn. Dkt. No. 14,
 Ex. 6. The Court of Appeals denied petitioner's motion to reconsider. Dkt. No. 14, Exs. 7,
 8.

01 on *Andress*); Dkt. No. 14, Ex. 10. Petitioner has subsequently filed several addenda to his
 02 petition, but to date, the stay has not been lifted and no decision has yet been rendered on his
 03 PRP. Dkt. No. 14, Ex. Nos. 11-16.

04 CLAIMS FOR RELIEF

05 Petitioner argues that remanding his case for further proceedings, including a potential
 06 trial under different but related charges, violates his right to avoid double jeopardy. Dkt. No.
 07 4. He argues that, following the Court of Appeals decision to vacate his sentence, all charges
 08 should have been dismissed with prejudice. *Id.* Respondent argues that petitioner has not
 09 properly exhausted his state remedies and that this Court should abstain from considering the
 10 matter until the Washington courts have had a sufficient opportunity to hear petitioner's
 11 claims. Dkt. No. 12. Respondent also argues that petitioner's claims lack merit. *Id.*

12 DISCUSSION

13 A. Petitioner's Claims Are Properly Raised Under 28 U.S.C. § 2241.

14 While 28 U.S.C. § 2254 provides jurisdiction for district courts to issue writs of habeas
 15 corpus on behalf of persons "in custody pursuant to the judgment of a state court[,"] that
 16 statute does not apply where, as here, the state-court judgment has been vacated. *Stow v.*
 17 *Murashige*, 389 F.3d 880, 885 (9th Cir. 2004). For prisoners whose judgments have been
 18 vacated and who remain in custody, petitions for a writ of *habeas corpus* are properly brought
 19 pursuant to 28 U.S.C. § 2241. *Id.* Section 2241 authorizes a general grant of *habeas*
 20 authority that should be applied when, for instance, a defendant raises a double-jeopardy claim
 21 and is being held pending retrial. *Id.* at 886.

22 In this case, petitioner has filed this petition for habeas corpus pursuant to 28 U.S.C.
 23 § 2241. Because he is being held at the state penitentiary in Walla Walla following the Court
 24 of Appeals' decision to vacate his state-court sentence, § 2241 is the proper vehicle for his
 25 petition. The deferential standards of the Antiterrorism and Effective Death Penalty Act of
 26 1996 therefore do not apply. *Murashige*, 389 F.3d at 888.

01 B. Petitioner Has Not Demonstrated That He Has Properly Exhausted His
 02 Claims.

03 Section 2241 does not explicitly require petitioners to exhaust their state court
 04 remedies before pursuing a writ of *habeas corpus* in federal court.³ Nevertheless, federal
 05 courts require, as a matter of prudence and comity, that petitioners “exhaust available judicial
 06 and administrative remedies before seeking relief under § 2241.” *Castro-Cortez v.*
 07 *Immigration and Naturalization Service*, 239 F.3d 1037, 1047 (9th Cir. 2001). This requires a
 08 petitioner to exhaust “all available state court [remedies]” before filing. *Braden v. 30th*
 09 *Judicial Circuit Court of Kentucky*, 410 U.S. 484, 491 (1973). This judicially created rule
 10 preserves the role of state courts and ensures their ability to administer justice without
 11 unnecessary intrusion by federal *habeas* proceedings. *Id.* at 490-91.

12 Here, petitioner has not exhausted his state-court remedies. According to the record
 13 before the Court, petitioner has filed a PRP with the Washington Court of Appeals that
 14 essentially raises the same issues, including his double-jeopardy claim, and that seeks the same
 15 relief as his current petition.⁴ Dkt. No 14, Ex. 14. The Washington Court of Appeals,
 16 however, has not yet issued a decision on petitioner’s PRP. Dkt. No. 14, Ex. 18. As a result,
 17 Washington State courts have not yet had an opportunity to consider fairly the merits of

18 ³The need to exhaust state court remedies is clearly established in the context of 28
 19 U.S.C. § 2254 petitions. *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005). A
 20 petitioner can satisfy the exhaustion requirement by either fairly and fully presenting each of his
 21 federal claims to the state’s highest court, or demonstrating that no state remedies are available
 22 to him. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). A petitioner fairly and fully
 23 presents a claim if he submits it “(1) to the proper forum, (2) through the proper vehicle, and
 24 by providing the *proper factual and legal basis for the claim.*” *Insyxiengmay v. Morgan*, 403
 25 F.3d 657, 668 (9th Cir. 2005) (emphasis added) (internal citations omitted); *see also Gray v.*
 26 *Netherland*, 518 U.S. 152, 162-63 (1996) (indicating that exhaustion requires petitioners to
 make “reference to a specific federal constitutional guarantee, as well as a statement of the
 facts that entitle the petitioner to relief.”).

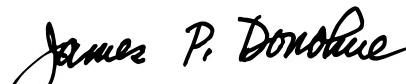
26 ⁴Petitioner has not yet presented his claims to the Washington Supreme Court in any
 direct or collateral-review proceedings.

01 petitioner's claims. Petitioner has not demonstrated why, in light of ongoing state-court
02 proceedings, a federal court should intervene at this time.

03 **CONCLUSION**

04 Because petitioner's claims have not yet been fully adjudicated by state courts, the
05 Court recommends that petitioner's 28 U.S.C. § 2241 motion be dismissed without prejudice.
06 A proposed order accompanies this Report and Recommendation.

07 DATED this 6th day of September, 2005.

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10 JAMES P. DONOHUE
11 United States Magistrate Judge
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